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No. 00-313

In The

Supreme Court of the United States

MICHAEL L. ADKINS and ROBERTA B. ADKINS,

Petitioners,

vs.

CHARLEY'S CLUB INC. d/b/a CHARLEY'S CLUB and UNCLE BART'S, INC. d/b/a/ UNCLE BART'S CLUB,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of The State Of Utah

BRIEF IN OPPOSITION

MARK L. ANDERSON
Counsel of Record
CHRISTENSEN & JENSEN, P.C.
50 South Main Street, Suite 1500
Salt Lake City, Utah 84144
(801) 323-5000
Attorneys for Respondent Charley's Club, Inc.

DONALD J. PURSER
DONALD JOSEPH PURSER & ASSOCIATES, P.C.
2735 East Parley's Way, Suite 303
Salt Lake City, Utah 84109
(801) 532-3555
Attorneys for Respondent Uncle Bart's Club, Inc.

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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QUESTIONS PRESENTED

1. Whether there are "compelling reasons" under Rule 10 of the United States Supreme Court Rules to grant the petition for writ of certiorari under the circumstances of this case, which involves an attack on a state court's interpretation of a state liquor statute.

2. Whether petitioners have waived the arguments asserted in support of their petition for writ of certiorari by failing to raise such arguments below.

3. Whether the Supreme Court of the State of Utah correctly applied the provisions of the Utah Dramshop Liability Act, Utah Code Ann. § 32A-14-101, *et seq.* (Dramshop Act) in ruling that petitioners were entitled to damages for injury to person, property or means of support, but were not entitled to recover wrongful death damages.

4. Whether the petitioners' claims of equal protection and due process based on the Fourteenth Amendment of the United States Constitution have any substantive merit.

CORPORATE DISCLOSURE STATEMENT

Neither Charley's Club, Inc. nor Uncle Bart's, Inc. have a parent corporation. No publicly held company owns 10% or more of the stock of Charley's Club, Inc. or Uncle Bart's, Inc.

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STATEMENT OF THE CASE

Petitioners seek review of the Utah Supreme Court's decision in *Adkins v. Uncle Bart's, Inc.*, 1 P.3d 528 (Utah 2000).[1] The petitioners' Statement of the Case is mostly accurate, although it omits much of the procedural history of the action, and incorrectly states that "[t]he federal question of the violation of the Fourteenth Amendment did not arise until the Utah Supreme Court issued its opinion." *Pet. at 3.* In fact, petitioners should have foreseen long before the issuance of the *Adkins* opinion the potential that the Dramshop Act would be interpreted in a manner that is adverse to their interests, and that federal constitutional arguments could conceivably be asserted. Respondents hereby submit an accurate recitation of the facts of this action pertaining to the petitioners' failure to timely raise their claims based on the United States Constitution.

This action arises out of the death of the petitioners' son, Sean Adkins, in an automobile accident. Petitioners sued drunk driver Paul Bredehoft ("Bredehoft"). They also sued respondents Charley's Club, Inc. and Uncle Bart's Club, Inc., private clubs that had served alcohol to Bredehoft. (Respondents Charley's and Bart's are jointly referred to hereafter as "the clubs.")

At the conclusion of the trial in a Utah state court, the jury arrived at the following verdicts:

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[1] The full text of the *Adkins* opinion is set forth in the Petition for Writ of Certiorari (hereafter "Pet."), Appendix A.

Compensatory Damages:

Special Damages	$ 7,725.73
General Damages	$1,000,000.00
Total	$1,007,725.73

Punitive Damages:

Paul Bredehoft	$ 500,000.00
Uncle Bart's Club	$ 250,000.00
Charley's Club	$ 100,000.00

(Pet., App. A at V-VI.)

After the verdict, various post trial motions were filed with and considered by the trial court. One such motion requested the trial court to reduce the verdict against the clubs in accordance with the damage cap of Utah's Dramshop Act. In opposing this motion, petitioners argued that the damage cap violated the Utah Constitution. *Record (hereafter "Rec.") at 1288-94.* In opposing application of the cap, the petitioners relied on no provision of the United States Constitution. *Id.*

The trial court determined that the damage cap of the Dramshop Act is constitutional, finding that no right to recover from dramshops existed at common law, and that the Utah Legislature was therefore free to cap recovery against dramshops. *Rec. at 1521-30.* Accordingly, the trial court reduced the compensatory damage awards against the clubs to the cap amount of $200,000 each ($100,000 for each plaintiff), and judgment was entered accordingly. *Pet., App. A at V.*

With respect to the punitive damage awards against the clubs, the trial court ruled that the Dramshop Act did

not prohibit an award of punitive damages against dramshops, and that the Act's damage cap did not apply to punitive damage awards. *Rec. at 1521-30.* Accordingly, judgment was entered against each club for the full amount of the jury's punitive damage verdict. *Pet., App. A at V-VI.*

Judgment was entered in favor of petitioners on their wrongful death claim against Bredehoft for the full amount of compensatory damages awarded by the jury, and for the punitive damages assigned to him by the jury. The judgment entered against Bredehoft totaled over $1.5 million. *Pet., App. A at VI.* Bredehoft never challenged this judgment. *Pet., App. A at II.*

Before entry of final judgment, the Utah Licensed Beverage Association and the Utah Hospitality Association were allowed to enter a friend of the court appearance in the trial court for the purpose of asserting the position that the petitioners could not recover damages pursuant to the Dramshop Act because the death of their son was not a compensable injury under the Act's plain language, which limited recovery to "injuries in person, property, or means of support," and that the Act (as written in 1994) did not provide for wrongful death damages. *Rec. at 1475-1519.* The clubs joined in the legal brief filed by *amicus curiae,* and moved the trial court for dismissal of the action based on the arguments contained therein. *Rec. at 1416, 1840 at 16.* The trial court denied that motion, and entered final judgment. *Rec. at 1652-58.*

Petitioners thereafter appealed to the Utah Supreme Court and argued, among many contentions, that the trial court had erred in ruling that the damage cap of the

Dramshop Act was constitutional. Petitioners also contended that the trial court had erred in ruling that the Dramshop Act was the exclusive remedy available to petitioners for the death of their son. *Pet., App. A at VI.* As before the appeal, petitioners continued to rely exclusively on provisions of the Utah Constitution, and never cited any provision of the United States Constitution in support of their position on appeal. *Pet. at 3.*

The clubs filed a cross-appeal. They argued that the trial court erred in refusing to dismiss the action on the ground that the petitioners lacked standing to sue under the Dramshop Act. *Pet., App. A at VI.* The clubs also asserted that punitive damages could not be awarded under the Dramshop Act. The clubs' cross-appeal was supported, in briefing and oral argument, by the Utah Licensed Beverage Association and Utah Hospitality Association as friends of the court. In opposing the clubs' cross-appeal, petitioners never relied on any provision of the United States Constitution. *Pet. at 3.*

The Utah Supreme Court (hereafter sometimes referred to as the "Utah Court") issued its ruling in this matter on January 18, 2000. In its decision (hereafter sometimes referred to as the "*Adkins* decision") the Utah Court ruled as follows:

- The Dramshop Act was the petitioners' exclusive remedy against the clubs, and accordingly, the trial court properly dismissed petitioners' claims for common law negligence and for violation of the Liquor Control Act. *Pet., App. A at VI-XI.*

- The 1994 version of the Dramshop Act provides for a narrow range of recoverable injuries. Pursuant to the Act, dramshops which serve alcohol in violation thereof are liable for "injuries in person, property or means of support . . . " This language is unambiguous. *Id. at XI-XII.*

- The term "injuries in person" within the meaning of the Act refers to physical bodily injuries. Because the petitioners did not sustain such injuries, they cannot recover for "injuries in person" within the meaning of the Dramshop Act. *Id. at XII-XIII.*

- The petitioners have not suffered injuries "in means of support" under the Act because their 17-year-old son did not financially support them. *Id. at XIV-XV.*

- The phrase "injuries in property" in the Act means injuries to real or personal property. Because parents are legally obligated to pay funeral expenses of their minor children, funeral costs and attendant expenses to the burial are "injuries to property" of the parents that may be recovered under the Act. *Id. at XIII-XIV.*

- Death is not an injury in person, property or means of support under the 1994 Dramshop Act. *Id. at XV-XVI.*

- Wrongful death damages are not recoverable under the 1994 version of the Dramshop Act. *Id. at XVI-XIX.*

- Because the Act does not expressly permit punitive damages, such damages may not be awarded against the clubs. *Id. at XIX.*

In light of these rulings, the Utah Court reversed the judgment entered against the clubs, and remanded the case with instructions to enter a judgment against the clubs only in the amount the Dramshop Act would allow: the funeral costs and burial expenses incurred by the petitioners. *Pet., App. A at XXI.* The $1,507,725.73 judgment entered against Bredehoft was not affected by the Utah Court's decision. *Pet., App. A.*

Petitioners then petitioned the Utah Court for rehearing, asserting that the *Adkins* decision somehow violates the First and Fourteenth Amendments of the United States Constitution, arguments they never previously made in pursuing their appeal, or in responding to the arguments asserted before the trial court by the private clubs and *amicus curiae.*

Petitioners' petition for rehearing was a collection of disjointed and unsupported arguments. Most of the contentions in the petition were merely a rehash of other arguments petitioners had previously raised, and which were carefully considered by the Utah Court in its *Adkins* decision. The Utah Court denied the petition for rehearing without comment. Petitioners thereafter petitioned this Court for a writ of certiorari.

In their Petition, petitioners ignore the criteria applicable to this Court's consideration of petitions for writs of certiorari. Because there are no "compelling reasons" for this Court to accept the petition, it should be summarily denied, and petitioners' ostensibly substantive arguments should not be considered.

REASONS FOR DENYING THE PETITION

The Petition purports to assert several arguments. However, the separately framed contentions of petitioners are actually one argument. That argument is that the Utah Supreme Court violated the petitioners' rights of due process and equal protection under the Fourteenth Amendment of the United States Constitution in its construction and interpretation of the Utah Dramshop Act.

The arguments herein establish that there is no justification for review in this case. Petitioners offer no compelling reason for review, and the Petition does not meet the requirements set forth in this Court's rules for granting a writ of certiorari. Further, the claims asserted by petitioners lack substantive merit. The Utah Supreme Court properly applied Utah law in determining that the Utah Dramshop Act did not provide a wrongful death cause of action, and that the Dramshop Act was petitioners' exclusive remedy against the clubs.

Moreover, Utah courts do not consider issues raised for the first time on appeal. The Fourteenth Amendment claims were not properly raised before the trial court or during the petitioners' appeal before the Utah Supreme Court. Accordingly, there are no federal questions to be decided. Further, the constitutional claims asserted in the Petition misstate the applicable standards of review and burdens of proof. Indeed, petitioners' constitutional claims are conclusory and substantively deficient. The Petition for a Writ of Certiorari should be denied.

I. THE PETITION IS DEFICIENT UNDER THE RULES OF THE SUPREME COURT.

A. Rule 10

In this case, petitioners attack a state court's interpretation of a state liquor statute. Rule 10 of the Supreme Court Rules governs this Court's consideration of the Petition for a Writ of Certiorari. That provision provides that review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for "compelling reasons." Sup. Ct. R. 10.

This Court's principal purpose for invoking certiorari jurisdiction is to resolve conflicts among the United States Courts of Appeals, as well as conflicts between United States Courts of Appeals and state courts with respect to federal questions. *Braxton v. United States*, 500 U.S. 344, 347 (1991). Other traditional grounds for granting a petition with regard to state court decisions include conflicts among state courts of last resort concerning an important federal question, state court decisions pertaining to questions of federal law that should be settled by this Court, or state court decisions of federal questions which conflict with relevant decisions of this Court.

Although Rule 10 states that this list is neither controlling nor a full measure of the Court's discretion, Petitioners fail to meet any of the Rule 10 criteria for granting a writ, and furthermore have shown no compelling reason why this Court should do so.

B. Rule 14

The Petition also fails to meet the requirements of Supreme Court Rule 14.1(g), which requires a concise statement of the case, containing the following:

> If review of a state-court judgment is sought, specification of the stage in the proceedings, both in the court of first instance and in the appellate courts, when the federal questions sought to be reviewed were raised; the method or manner of raising them and the way in which they were passed on by those courts; and pertinent quotations of specific portions of the record or summary thereof, with specific references to the places in the record where the matter appears (*e.g.*, court opinion, ruling on exception, portion of court's charge and exception thereto, assignment of error), *so as to show that the federal question was timely and properly raised and that this Court has jurisdiction to review the judgment on a writ of certiorari.*

Sup. Ct. R. 14.1(g)(i) (emphasis added). The Petition filed in this action devotes three sentences to this requirement:

> The Federal question of the violation of the Fourteenth Amendment did not arise until the Utah Supreme Court issued its opinion. The Constitution [sic] issues were address [sic] in the Petitioners [sic] petition for rehearing. The Utah Supreme Court denied the Petition for rehearing without comment on May 31, 2000.

Pet. at 3. Petitioners do not provide any quotations or specific references in the record to show that the federal questions were timely and properly raised, because they

were in fact not timely raised. As discussed more fully below, the petitioners' arguments should not be considered given their failure to timely raise the federal question.

Rule 14.4 further states that the failure of a petitioner to present "with accuracy, brevity and clarity whatever is essential to ready and adequate understanding of the points requiring consideration is sufficient reason for the Court to deny a petition." The clubs submit that the arguments asserted in the Petition wholly fail to meet this requirement, and justify summary denial.

C. Rule 29.4(c)

Petitioners have also failed to comply with this Rule, which provides:

> In any proceeding in this Court in which the constitutionality of any statute of a State is drawn into question, and neither the State nor any agency, officer, or employee thereof is a party, the initial document filed in this Court shall recite that 28 U.S.C. § 2403(b) may apply and shall be served on the Attorney General of that State.

Sup. Ct. R. 29.4(c). In this action, petitioners attack the Utah Supreme Court's construction of the Utah Dramshop Act on constitutional grounds. In other words, petitioners contend that the Act, as interpreted by the highest court of the State of Utah, is unconstitutional. Although the constitutionality of the Dramshop Act has been "drawn into question" within the meaning of Rule 29.4, the Petition makes no mention as to compliance with this

Rule, nor are the clubs aware of any such filing with the Utah Attorney General.

II. THERE ARE NO FEDERAL QUESTIONS APPROPRIATE FOR REVIEW BY THIS COURT BECAUSE THE PETITIONERS' CONSTITUTIONAL CLAIMS WERE NOT PROPERLY RAISED BELOW.

This Court should not consider the federal due process and equal protection claims asserted by petitioners because these claims were not raised below or addressed by the trial court or Utah Supreme Court. Only *after* the Utah Supreme Court rendered its decision in this action did petitioners first assert their Fourteenth Amendment claims in their Petition for Rehearing.

A. The Necessity of Preserving Issues for Review

This Court has long held that "the attempt to raise a federal question after judgment, upon a petition for rehearing, comes too late, unless the court actually entertains the question and decides it." *Herndon v. State of Georgia*, 295 U.S. 441, 443 (1935); *Radio Station WOW v. Johnson*, 326 U.S. 120, 128 (1945) ("Questions first presented to the highest State court on a petition for rehearing come too late for consideration here . . . ")

With "very rare exceptions," *Yee v. City of Escondido*, 503 U.S. 519, 533 (1992), this Court has adhered to the rule that in reviewing state court judgments, a federal claim will not be heard unless it was either addressed by, or properly presented to the state court that rendered the decision. *Adams v. Robertson*, 520 U.S. 83, 86 (1997). When

a state court denies without comment a petition for review, which raises a federal issue for the first time, the state court has not addressed the federal issue. *Estate of Wilson v. Aiken Industries, Inc.*, 439 U.S. 877, 879 (1978) (Blackmun, J., concurring); *See Yee*, 503 U.S. at 533 (denial of discretionary review by state supreme court expresses no view to merits, and therefore federal claim was not addressed below by state court).

In the instant case, it is clear that the Utah Supreme Court did not address the Fourteenth Amendment claims asserted by petitioners; indeed, the Utah Supreme Court denied the Petition for Rehearing without comment. The Petition for Writ of Certiorari filed in this Court fails to acknowledge that in order for petitioners' claims to be heard by this Court, petitioners must show that they properly raised the Fourteenth Amendment issues below. Moreover, petitioners have not made any attempt to explain on what grounds they should qualify for an exception to the rule that otherwise mandates denial of their petition.

"When the highest state court is silent on a federal question before us, we assume that the issue was not properly presented." *Adams*, 520 U.S. at 86 (citing *Bd. of Dirs. of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 550 (1987)). The aggrieved party bears the burden of defeating this assumption, by demonstrating that the state court had a "fair opportunity to address the federal question that is sought to be presented here." *Id.* at 87 (quoting *Webb v. Webb*, 451 U.S. 493, 501 (1981)).

In *Adams*, this Court discussed several ways in which a petitioner may satisfy this requirement. A petitioner

may either establish that the claim was raised at the time and in the manner required by the state law in question, or persuade the Court that the state procedural requirements could not serve as an independent and adequate state-law ground for the state court's judgment. Alternatively, the petitioner may demonstrate that the particular claim at issue was presented with "fair precision and in due time." *Id.* at 87 (citations omitted).

As in *Adams*, in this action the petitioners have "done nothing to demonstrate that they complied with the applicable state rules" for raising their federal claims before the Utah Supreme Court, nor have petitioners explained why their failure to comply with Utah's rules would not be an adequate independent state ground for the court to disregard the claims. *Id.* at 87-88. Utah recognizes the rule that issues raised for the first time on appeal will not be reviewed. "This general rule applies to constitutional issues first raised on appeal as well as to other issues, unless a person's liberty is at stake." *Pratt v. City Council of the City of Riverton*, 639 P.2d 172, 173-74 (Utah 1981). This rule is equally applicable to arguments presented for the first time in a petition for rehearing. *State v. Sampson*, 808 P.2d 1100, 1112 (Utah App. 1991), *cert. denied*, 817 P.2d 327 (Utah 1991) and 503 U.S. 914 (1992) ("We ordinarily will not consider arguments presented for the first time on petition for rehearing, and are especially loathe to revisit a decision once rendered when the party seeking reconsideration intentionally did not present us with particular arguments in more timely fashion.").

Petitioners have likewise made no demonstration that the federal claims were presented with "fair precision and in due time" to the state court. In fact, the focus of the clubs' post-trial motions and its appeal at the Utah Supreme Court related directly to the issue that petitioners claim as the basis of the alleged constitutional violations, namely, that the Dramshop Act did not include a cause of action for wrongful death. Petitioners did not argue at that time that if the court were to adopt the clubs' position, such an interpretation would result in the equal protection and due process violations now claimed. Instead, petitioners raised the constitutional claims only *after* final judgment, making general conclusory allegations of Fourteenth Amendment violations, without any proper analysis, in a manner clearly lacking "fair precision." *Pet. at 3-9.*

B. Petitioners Do Not Meet an Exception to Justify a Departure from the General Rule that Issues Must be Properly Raised Below.

Notwithstanding their failure to even so argue, petitioners do not meet any of the "very rare exceptions" to justify the Court hearing the case despite petitioners' failure to properly raise the federal issues below. In *Herndon,* this Court discussed a narrow exception to the general rule, where the ruling made by the state court could not have been anticipated and the petition for rehearing presented the first opportunity to raise the federal question. 295 U.S. at 444.

In this matter, petitioners might invoke *Herndon* to argue that they could not have anticipated the ruling of

the Utah Supreme Court. However, this contention would be without merit. Petitioners were wholly aware of the potential ruling by the Utah Supreme Court, since the clubs had argued since immediately after the trial that the Dramshop Act did not provide a remedy for wrongful death. After the trial court rejected the argument, the clubs pursued it throughout the appeal before the Utah Supreme Court, and if petitioners believed that an adverse ruling on the issue would cause them constitutional harms, they had an obligation to raise such issues before the Utah Supreme Court. Petitioners cannot now complain that the ruling was unanticipated, or that the Petition for Rehearing was the first opportunity to raise the issue.[2]

III. THE CONSTITUTIONAL CLAIMS RELIED ON BY PETITIONERS LACK SUBSTANTIVE MERIT.

In this matter, the petitioners' substantive arguments lack merit and fail to assert coherently, let alone demonstrate, any violations of the Fourteenth Amendment.

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[2] Furthermore, in *Estate of Wilson v. Aiken Industries, Inc.*, 439 U.S. at 879, Justice Blackmun's concurring opinion suggests that where the state court denies a motion for rehearing without explanatory comment, "as a consequence, petitioners fall short of placing themselves within the protective exception recognized in [*Herndon*]."

A. The Utah Supreme Court's Interpretation of the Dramshop Act does not Violate Federal Constitutional Guarantees of Equal Protection.

The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution provides that no state shall "deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. This clause requires that state laws treat similarly situated persons alike unless a reasonable basis exists for treating them differently. *McLaughlin v. Florida*, 379 U.S. 184 (1964).

This case presents no fundamental right or suspect classification. Therefore, the petitioners' equal protection claims will be measured by the "rational relation" test.[3] Under this test, the dissimilar treatment need only be rationally related to a valid public purpose to be considered constitutional. *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61 (1910).

Petitioners assert that the Utah Supreme Court's interpretation of the Dramshop Act somehow creates an "arbitrary and invidious" classification based on two arguments. First, petitioners allege that the Utah Court

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[3] Petitioners contend, in error, that "[t]o survive the Equal Protection challenge in a case such as this, the proponent of the case must show that the discrimination between classes is rationally related to a compelling governmental purpose. *Pet. at 4*. Petitioners misstate the rational relation test. In equal protection claims where neither a suspect classification nor a fundamental right are involved, the party *challenging* the governmental action must show that the decision was not rationally related to a *legitimate* governmental objective. *Heller v. Doe*, 509 U.S. 312, 319-20 (1993).

improperly construed the Act such that it only provides rights of recovery for injuries in "person, property or means of support," and precludes rights of recovery for death. *Pet. at 3-5.* Second, petitioners contend that the Utah Court's ruling unconstitutionally prohibits punitive damage recoveries from dramshops, while allowing the recovery of punitive damages from other defendants. *Pet. at 9-10.* Petitioners offer no evidence or support for these arguments, which lack any legal merit.

1. No Discrimination in Remedies under the Dramshop Act

Petitioners create a false distinction between the rights of those who are injured and live and the rights of those who are injured [illegible] die to allege an equal protection violation. In fact, that classification does not exist under the Dramshop Act and the Act does not, as petitioners claim, cut off rights of those who are injured and die, versus the rights of those who are injured and live.

The Act limits the type of injuries that *all* persons can recover, whether living or dead, and those injuries are "injuries in person, property or means of support." Therefore, the injured person can recover special damages (e.g., medical costs and lost wages) and general damages (e.g., physical bodily injury and pain and suffering), regardless of whether the victim lives or dies. Further, regardless of whether the injured person lives or dies, those who relied on the victim for financial support are provided for under the Dramshop Act. There is no distinction between the living and dead. The Dramshop

Act simply recognizes the truism that injuries to a decedent cease at the death of the person. That difference is present in all tort cases.

Clearly, the mental and emotional injuries of petitioners (as opposed to the victim, their son) which petitioners claim here and attempted to recover for themselves are not, as the Court correctly interpreted, recoverable as an injury in "person." *Pet., App A at XII-XIII.* Those injuries are not recoverable by any person under the Act, and that fact does not change based upon whether the injured person lives or dies. Had Sean Adkins lived, the Dramshop Act would not have allowed petitioners to recover any mental and emotional damages, because the Dramshop Act does not allow Sean Adkins' parents that kind of recovery. They *did* obtain a judgment for those injuries under the Wrongful Death Act against Bredehoft. Therefore, petitioners' ostensible distinction between the rights of the living versus the rights of the dead is a fallacy, and no equal protection violation can possibly arise with regard to the Fourteenth Amendment.

Similarly, petitioners' equal protection claims concerning punitive damages are specious. The Act does not treat injured people differently in the least with regard to punitive damages. *All* persons injured by drunk drivers can sue such tortfeasors for punitive damages. *Biswell v. Duncan*, 742 P.2d 80 (Utah App. 1987). Similarly, *all* persons injured by drunk drivers have a strict liability claim against the dramshop that served alcohol to the tortfeasor, but may not recover punitive damages from the dramshop. "The Act is not intended to punish dramshop owners . . . , and because it does not expressly

permit punitive damages, we will not expand the Act to permit their award. In this conclusion, we are in accord with courts of many other states which allow punitive damages only when expressly authorized by statute." *Adkins*, 1 P.3d at 537, *Pet., App. A at XIX-XX*. Thus, petitioners are not treated in a disparate manner by the Utah Court's ruling that punitive damages cannot be recovered from dramshops.

2. No Violation of the Petitioners' Equal Protection Rights

Even if the Dramshop Act did establish a distinction between the rights of the living versus the rights of the dead, or the right to sue for punitive damages, the distinction does not violate petitioners' right of equal protection. As set forth previously, the alleged distinction created by the Dramshop Act's remedy provision need only pass the rational relationship test to be considered constitutional.

The Utah Dramshop Act easily satisfies that test. The Utah Legislature, in enacting the Act, sought to advance the public purpose of establishing a strict liability cause of action against dramshops which do not directly *cause* injury to third persons but instead serve alcohol to certain persons who *in turn* cause injury to innocent third persons. Under the Act, the injured third persons need only show that the dramshop caused the intoxication of the tortfeasor to impose liability upon the dramshop. The third person need not show wrongful intent or negligent conduct on the part of the dramshop to recover. 1 P.3d at 532, *Pet., App. A at VIII.*

In exchange for imposing strict liability upon dramshops, the Utah Legislature limited the dramshops' liability exposure in two ways. First, the types of injuries recoverable against dramshops are expressly defined under the statute. *Pet., App E.* Second, the statute sets a maximum cap for recoverable damages. *Id.* The limited liability imposed by the Dramshop Act evidences first the legislature's acknowledgement that dramshops are legitimate businesses that are sometimes unable to recognize when customers are abusing their right to obtain alcohol and/or when customers intend to drive vehicles or conduct themselves in other dangerous ways, and second, that the vast majority of their customers never cause any injuries.

With respect to restricting the types of injuries for which damages are recoverable, the Utah Legislature, prior to 1997,[4] unambiguously and plainly limited recovery to "injuries in persons, property, or means of support". *See* Utah Code Ann. § 32A-14-101 (1994), *Pet., App. E.* That language precludes recovery for death. 1 P.3d at 535, *Pet., App. A at XV-XVI.* The recoverable injuries to "person, property or means of support" are primarily

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[4] In 1997, the Utah Legislature amended the Dramshop Act making dramshops liable for "an injury in person, property or means of support. . . . or for the death of a third person." Utah Code Ann. § 32A-14-101(1)(a) (1999), attached as *Pet, App. F.* The fact that the legislature saw a need to include this additional language allows a presumption that such damages for death were *not* previously allowed, under the doctrine *expressio, unius est exclusio alterius. See Field v. The Boyer Co.*, 952 P.2d 1078, 1086 (Utah 1998) (under the doctrine, the expression of one thing is the exclusion of another.)

considered remedial compensation for out-of-pocket costs (medical costs, lost wages etc.) which the Utah Legislature determined to pass on to dramshops, entities that will likely be able to satisfy such compensation through insurance.[5] Accordingly, the restriction of recoverable injuries is rationally related to spreading the costs of a societal problem of drunken driving. 1 P.3d at 537, *Pet., App. A at XIX-XX* (quoting *Walter v. Carriage House Hotels, Ltd.* 646 N.E.2d 599, 603 (Ill. 1995) ("The Act created a cause of action for innocent third parties, and 'intended to place the economic consequences of intoxicated behavior primarily on the businesses that profited from the liquor trade.' ")).

Hence, the restrictions upon recovery under the Dramshop Act are cost-spreading measures that are rationally related to the valid public purpose of the Act, holding entities liable or responsible for economic losses without determining whether such entities committed negligence or wrongful conduct. Accordingly, even assuming that petitioners raise issues that could be considered under Rule 35, the petitioners' substantive arguments lack merit and fail to assert coherently, let alone demonstrate, that any part of the *Adkins* decision is unconstitutional on equal protection grounds, or even erroneous. Thus, this Court should deny the petitioners' Petition on the merits.

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[5] By statute, dramshops are required to purchase liability insurance coverage as a prerequisite to licensure by the State of Utah Department of Alcoholic Beverage Control. *See e.g.* Utah Code Ann. §§ 32A-4-102(i) and 32A-5-102(k) (Supp. 1994).

B. The Utah Supreme Court's Interpretation of the Dramshop Act does not Violate Federal Constitutional Guarantees of Due Process.

Petitioners argue that the Utah Supreme Court violated their rights of due process by improperly interpreting the Dramshop Act and Utah's Wrongful Death Statute, Utah Code Ann. § 78-11-6 (1953 as amended) ("Wrongful Death Statute"). *Pet. at 5-6.* Those contentions are without merit. The Utah Court's ruling violates neither petitioners' rights of due process nor rules of statutory construction.

The Due Process Clause of the Fourteenth Amendment to the United States Constitution provides that no state shall "deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1. The life, liberty and property rights protected by this provision include those rights enumerated in the Constitution and those rights that are " 'so rooted in the traditions and conscience of our people as to be ranked as fundamental' . . . and those which are 'implicit in the concept of ordered liberty.' " *Snyder v. Massachusetts*, 291 U.S. 97 (1934); *Palko v. Connecticut*, 302 U.S. 319 (1937).

In protecting fundamental rights, due process substantively restricts the ways in which legislatures limit individual freedom, and if a deprivation of such freedom or right is permitted and constitutional, certain procedural due process must be accorded if the government deprives the individual of the freedom. *See* RONALD D. ROTUNDA AND JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW § 17.1 (2nd ed. 1992).

Petitioners fail to identify any constitutionally recognized liberty interest or other due process protection they have which is affected by the Utah Court's ruling. Protected interests typically include classifications and discrimination based on gender, age, race, and residency status, and limitations on freedom of speech and assembly, freedom of association, the right of privacy and the rights of the criminally accused.

Petitioners' claim of a constitutional right to recover wrongful death damages from a dramshop involves none of the foregoing interests, or any other fundamental right. Plainly stated, neither the petitioners, their deceased son nor anyone else has a fundamental right under the United States Constitution to a particular rule of law or civil remedy, such as remedy for wrongful death, created under the common law or by statutory law. In *Duke Power Company v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59 (1978), this Court stated:

> Our cases have clearly established that "[a] person has no property, vested interest, in any rule of the common law." . . . The "Constitution does not forbid the creation of new rights, or the abolition of old ones recognized by the common law, to attain a permissible legislative object," . . . despite the fact that "otherwise settled expectations" may be upset thereby. Indeed, statutes limiting liability are relatively commonplace and have consistently been enforced by the courts.

Duke Power, 438 U.S. at 88 n.32 (citations omitted).[6] Accordingly, since the petitioners have not identified a fundamental right that is affected by the Utah Court's *Adkins* decision, federal due process does not substantively or procedurally entitle the petitioners to a cause of action against the clubs for the wrongful death of their son.

Further, petitioners' claim that the Utah Supreme Court violated rules of statutory construction is flat wrong. Throughout its opinion, the Utah Court carefully *followed* rules of statutory construction, correctly giving effect to the plain and unambiguous language of the Dramshop Act of "injuries in person, property, or means of support," and correctly finding that the Wrongful Death Statute had no application to the petitioners' claims against the clubs.

Applying the rules of statutory construction to well-established case law, the Utah Supreme Court properly found that the language of the Dramshop Act concerning the types of injuries recoverable under the Act is plain and unambiguous, and as such is the best evidence of the Utah Legislature's true intent and purpose. The plain term "injuries in person" means physical bodily injuries to the victim, and does not include emotional suffering

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[6] Similarly, statutory rights may be constitutionally abrogated under the Utah Constitution. *See Cruz v. Wright*, 765 P.2d 869, 871 (Utah 1988) (legislature may entirely eliminate or abrogate a cause of action under Article 1, § 11, so long as the elimination or abrogation "is not an arbitrary or unreasonable means [of] achieving the objective.") (citing *Berry v. Beech Aircraft Corp.*, 717 P.2d 670, 676, 680 (Utah 1985)).

without physical injury to the victim's parents. 1 P.3d at 534, *Pet., App. A at XII-XIII.* The plain term "injuries in means of support" means financial support, and does not mean emotional support, comfort, or society. *Id.* at 534-35, *Pet., App. A at XIV-XV.* The entire phrase "injuries in person, property or means of support" plainly does not include injury for death. *Id.* at 535, *Pet., App. A at XV-XVI.*

The Utah Supreme Court also properly found that the Dramshop Act and the Wrongful Death Statute are incompatible, and the two statutes could not be merged to create a wrongful death cause of action against a dramshop. *Id.* at 535-36, *Pet., App. A at XVI-XVIII.* That finding was also grounded upon the plain language of the two statutes, the Wrongful Death Statute being based upon the fault (wrongful act or neglect) of the tortfeasor, while liability under the Dramshop Act arises without fault. *See id.* Therefore, the Utah Court's precise interpretation of the Dramshop Act follows statutory construction rules, and is correct.

CONCLUSION

In their Petition for a Writ of Certiorari, petitioners attempt to demonstrate that the Utah Supreme Court's interpretation of a state law violates their rights under the United States Constitution. This attempt fails on multiple fronts. First, petitioners do not appear to meet the standard necessary for obtaining a writ of certiorari under Rule 10 of the Supreme Court Rules. Second, the Petition raises arguments that were not even considered

by the Utah Supreme Court. Third, the Petition is a collection of disjointed complaints regarding the result of the Utah Court's decision, rather than a proper legal analysis of the particular points of law or fact that would support a proper petition for writ of certiorari. Finally, petitioners' arguments lack substantive merit.

The bottom line in this case is that the petitioners properly obtained a large wrongful death judgment against the tortfeasor who caused their son's death, and have been awarded the only damages against the clubs that applicable state law allowed; i.e., property damages. This case was properly decided, given the clear and unambiguous language of the state statute in question. Moreover, all constitutional challenges asserted by petitioners are groundless, and should be rejected by this Court.

For the foregoing reasons, the arguments asserted in support of the Petitioners' Petition for Writ of Certiorari are without basis, and the Petition should be summarily rejected.

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Respectfully submitted,

MARK L. ANDERSON
Counsel of Record
CHRISTENSEN & JENSEN, P.C.
50 South Main Street, Suite 1500
Salt Lake City, Utah 84144
(801) 323-5000

Attorneys for Respondent
Charley's Club, Inc.

DONALD J. PURSER
Counsel of Record
DONALD JOSEPH PURSER &
ASSOCIATES, P.C.
2735 East Parley's Way, Suite 303
Salt Lake City, Utah 84109
(801) 532-3555

Attorneys for Respondent
Uncle Bart's Club, Inc.